APPENDIX A

The Constitutional Provisions and Statutes Involved

The Fifth Amendment to the Constitution

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§5 (2) (b) of the Interstate Commerce Act, 49 U.S.C. §5 (2) (b)

UNIFICATIONS, MERGERS AND ACQUISITIONS OF CONTROL

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Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If

the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms, and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

§ 20a(2) of the Interstate Commerce Act, 49 U.S.C. §20a(2) §Securities of carriers; issuance, etc.

* * * * *

Issuance of securities; assumption of obligations; authorization

It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or

indebtedness of the carirer (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose: *Provided,* That nothing in this section is to be construed as applying to securities issued or obligations or liabilities assumed by the United States or any instrumentality thereof, or by the District of Columbia or any instrumentality thereof, or by any State of the United States, or by any political subdivision or municipal corporation of any State, or by any instrumentality of one or more States, political subdivisions thereof, or municipal corporations. As amended July 24, 1965, Pub.L. 89-86, § 1, 79 Stat. 263.

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APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17106

FRIEDA SUFFIN,

Appellant

v.

THE PENNSYLVANIA RAILROAD COMPANY,
THE PENNSYLVANIA COMPANY AND
NORFOLK AND WESTERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued May 7, 1968
Before HASTIE, *Chief Judge*, and
McLAUGHLIN and VAN DUSEN, *Circuit Judges*

OPINION OF THE COURT
(Filed June 6, 1968)

PER CURIAM

This appeal is from an order of the District Court granting defendants-appellees' motions to dismiss a derivative stockholder suit for lack of jurisdiction. See *Suffin v. Pennsylvania Railroad Company*, 276 F. Supp. 549 (D. Del. 1967), where the background facts and motions are accurately summarized. The appellant brought her derivative suit, seeking damages for breach of fiduciary duty, as related to the exchange, over a ten-year period, of convertible debentures issued by Norfolk and Western Railway Company (N & W) for N & W common stock held by The Penn-

sylvania Company, a wholly-owned subsidiary of The Pennsylvania Railroad Company (together, PRR).

Even though the complaint alleges that PRR dominated and controlled N & W through stock ownership and an interlocking directorship at the time of the initial "memorandum of agreement" setting the terms of the challenged exchange (September 22, 1964), the complaint also concedes that all PRR officers and directors had resigned from the N & W Board by September 16, 1964. The record further shows that on October 13, 1964, PRR had deposited all its shares of N & W in three, I.C.C.-approved, independent voting trusts pursuant to the Interstate Commerce Commission (I.C.C.) "merger" decision of June 24, 1964, which established certain preconditions for a railroad merger, 324 I.C.C. 1, 48-49 (1964). The transaction was approved again by the N & W directors on September 28, 1965 (328 I.C.C. at 885) and the agreement (dated as of December 31, 1965) was submitted for I.C.C. approval on February 28, 1966. The "securities" decision of April 13, 1966, approving the contemplated exchange, 328 I.C.C. 884 (1966), makes specific reference to the earlier merger decision and to its required PRR divestiture of N & W stock, and we note, as did the District Court, that in its "merger" decision the I.C.C. explicitly "retain[ed] jurisdiction for the purpose, among others, of insuring an orderly divestiture within the 10-year period . . . " 324 I.C.C. at 48.[1]

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[1] The appellant's argument that the "merger" and "securities" decisions should be viewed as "separate and distinct" was rejected by the District Court 276 F. Supp. at 552. A reading of the two Reports of the Commission strongly supports this conclusion and the inter-relationship of this merger and divestiture plan with several other mergers and securities problems before the I.C.C. (see 324 I.C.C. at 16 ff.) suggests that the delay between the two decisions is not support for appellant's argument that the I.C.C. decisions are related only "historically." See *Penn-Central Merger Cases,* 389 U.S. 486, 511-518 (1968).

Appendix B—Opinion of the Court of Appeals

The District Court concluded that the I.C.C. had approved the challenged securities transaction and, in doing so, acted pursuant to statutory authority that allowed, in the particular circumstances of the suit at bar, a determination that the terms of the securities transaction were "just and reasonable"[2] to private interests. Consequently, the District Court decided that the I.C.C., in approving the transaction, had passed on the gravamen of appellant's complaint and that her suit, therefore, constituted a challenge to an I.C.C. determination that had to be brought before a three judge District Court pursuant to 28 U. S. C. §§2321-2325. Accordingly, the motions to dismiss were granted.

Our own examination of the two I.C.C. decisions involved, 324 I.C.C. 1 (1964) and 328 I.C.C. 844 (1966), and particularly our consideration of the detailed discussion of the divestiture required, 324 I.C.C. at 24-28, and the explicit I.C.C. finding that the exchange "is in the best interest of the . . . security holders," 328 I.C.C. at 891, convinces us that the District Court reached the proper result.[3] The

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[2] 49 U. S. C. § 5(2) (b). See *Schwabacher v. United States*, 334 U. S. 182 (1948), where the court used this language at pp. 198-9, in addition to the wording quoted at pp. 553-4 of the District Court opinion:

> "Apart from meeting the test of the public interest, the merger terms, as to stockholders, must be found to be just and reasonable."

See, also, 49 U. S. C. § 20a.

[3] Appellant argues that the debenture-for-stock transaction was not contemplated by the merger decision since the I.C.C. mentioned only a cash purchase by N & W of its own stock. 324 I.C.C. at 41. We reject this argument, and any conclusions drawn therefrom, since the cash purchase discussion was not presented as the sole device for N & W repurchase and the I.C.C. appears to have discussed the impact of a "cash sale" on the N & W because it was the type of repurchase that would have hurt the N & W the most—as contrasted with a multitude of potential deferred payment alternatives. Since a party asserting jurisdiction carries the burden of proof, see *Kaufman v. Liberty Mutual Insurance Company*, 245 F. 2d 918, 920 (3rd Cir. 1957), appellant's interpretation of the I.C.C. report, without more, is a weak foundation for allowing their statutory argument to prevail.

appellant's statutory argument must be rejected in view of the inter-relationship between the above-mentioned I.C.C. "merger" and later "securities" decisions, 276 F. Supp. at 552. The District Court was entirely correct in concluding that *Otis & Co. v. Pennsylvania R. Co.*, 61 F. Supp. 905 (E.D. Pa. 1945), aff'd. 155 F. 2d 522 (3rd Cir. 1946), was inapposite and did not govern this case (276 F. Supp. at 554).[4] We will affirm the order of dismissal for lack of jurisdiction[5] on the basis of the thorough and persuasive opinion of Chief Judge Wright.

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[4] Our conclusion that the "merger" and "securities" decisions are in fact interrelated obviates any need to discuss at length the appellant's arguments on the statutory nature of an I.C.C. determination if a "securities" decision is related to a merger only "historically" and is subject to I.C.C. review solely under the language of § 20a. Decisions such as *County of Marin v. United States*, 356 U. S. 412 (1958); *Pittsburgh & W. Va. Ry. v. United States*, 281 U. S. 479 (1930); and *N. Y. Central Securities Co. v. United States*, 287 U. S. 12 (1932), are thus inapposite in these circumstances since the question of what the I.C.C. "must" do in a § 20a determination is irrelevant in a situation where it chose to exercise §20a powers in connection with a merger under §5, *Schwabacher v. United States*, *supra*.

There is no doubt that the appellant and her class could have intervened and been heard in the I.C.C. proceedings, e. g., 49 U. S. C. § 73(1), *Southern Railway Company v. United States*, 186 F. Supp. 29, 42 (N. D. Ala. 1960); *Abramson v. Western Maryland Railway Company*, 142 F. Supp. 694, 696 (E. D. Pa. 1956); 49 U. S. C. § 20a(6); *Alleghany Corp. v. Breswick & Co.*, 353 U. S. 151, 175 (1957); see, also, *Oscar Gruss & Son v. United States*, 386 U. S. 776 (1967). Although the N & W proxy of March 23, 1966 gave relatively short notice of the pending application to the I.C.C. for approval of the exchange of stock for debentures, the N & W proxy of April 2, 1965, gave the appellant ample notice that a debenture-for-stock purchase agreement was being prepared as part of the divestiture necessary to accomplish the merger. The essential terms and characteristics of the transaction were set forth and an aggrieved shareholder was on notice that such a transaction was to be submitted to the I.C.C. for approval at a future date.

[5] The submitted order, approved by all counsel, provided for dismissal with prejudice. Although she argues that dismissal "with prejudice" is improper in this case, appellant has advanced no reasons why she should not be deemed to have waived this objection.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,106

BRENDA SUFFIN,

Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
THE PENNSYLVANIA COMPANY and
NORFOLK AND WESTERN RAILWAY COMPANY

(D. C. Civil Action No. 3342)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Present:

HASTIE, Chief Judge, and McLAUGHLIN and VAN DUSEN, Circuit Judges.

Appendix C—Judgment of the Court of Appeals

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed November 29, 1967, be, and the same is hereby affirmed, with costs.

ATTEST:

THOMAS F. QUINN
Clerk

June 6, 1968